

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25

MARCH 27, 1991

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U.S. Court of International Trade

Slip Op. 91-14

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Classification: C91/52 Through C91/54

Amendments to the Rules of the Court

THE DEPARTMENT OF THE TREASURY

U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notice

PROPOSED CHANGES IN THE SAMPLING RATE OF BULK RAW SUGAR

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of proposed changes in sampling rate of bulk raw sugar.

SUMMARY: This document proposes to change the sampling rate of bulk raw sugar from the required one sample for each 700,000 pounds of dutiable raw sugar to one sample for every 2,100,000 pounds. Customs is proposing this change because laboratory data shows that less frequent sampling will be adequate for Customs purposes.

DATE: Comments must be received on or before May 2, 1991.

COMMENTS: Written comments (preferably in triplicate) may be addressed to and inspected at the Office of Laboratories and Scientific Services, Room 7113, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Ms. Beverly Karl, Office of Laboratories and Scientific Services, 202-566-2446.

SUPPLEMENTARY INFORMATION:

BACKGROUND

At the present time bulk raw sugar is sampled according to Customs Directive 3230-18, "Guidelines for the Sampling and Testing of Dutiable Raw Sugar" dated January 10, 1989. This directive states that the sampling rate shall be one sample for each 700,000 pounds of dutiable raw sugar. Customs is proposing that this rate be changed to one sample for every 2,100,000 pounds. Customs is proposing this change because laboratory analyses on 700,000 pounds samples show that there is sufficient uniformity within sugar shipments to adequately determine the landed quantity using the lower sampling rate of one sample per 2,100,000 pounds.

At the same time, however, it is recognized that the present sampling rate of one sample for each 700,000 pounds of raw sugar is in alignment with the sampling rate used by many importers for settlement and other

purposes. In addition, the automatic sampling equipment used in most sugar unloading operations are set for that rate and the ability to change to a different rate or multiple rates needs to be determined.

Accordingly, before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Office Of Laboratories and Scientific Services, Room 7113, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

Dated: March 12, 1991.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 18, 1991 (56 FR 11485)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 162

RIN 1515-AA67

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO THE LIABILITY OF COMMON CARRIERS FOR FAILURE TO EXERCISE THE HIGHEST DEGREE OF CARE AND DILIGENCE TO PREVENT THE CARRIAGE OF UNMANIFESTED CONTROLLED SUBSTANCES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document extends the period of time within which interested members of the public may submit comments concerning the regulations Customs proposed relating to the highest degree of care and diligence standard for carriers. Customs has received several requests to extend the comment period to allow time to prepare responsive comments. The comment period is extended 30 days.

DATES: Comments are requested on or before April 15, 1991.

ADDRESSES: Comments may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriett D. Blank, Penalties Branch (202) 566-8317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A document was published in the Federal Register (56 FR 5665) on February 12, 1991, proposing to amend the Customs Regulations by setting forth criteria that common carriers, if they wish to avoid liability when controlled substances are found aboard a conveyance, may use in determining whether they are taking all possible steps to comply with the statutory highest degree of care and diligence standard. Carriers are required by statute to exercise the highest degree of care and diligence to prevent the carriage of unmanifested controlled substances. The pro-

posals solicited comments that were to be received on or before March 14, 1991. Customs has received several requests to extend the period of time for comments. The requesters state additional time is required to prepare responsive comments. Customs believes the requests have merit. Accordingly, the period of time for the submission of comments is being extended 30 days.

Dated: March 8, 1991.

JOHN B. O'LOUGHLIN,
Acting Assistant Commissioner,
Office of Commercial Operations.

[Published in the Federal Register, March 15, 1991 (56 FR 11122)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Edward D. Re

Judges

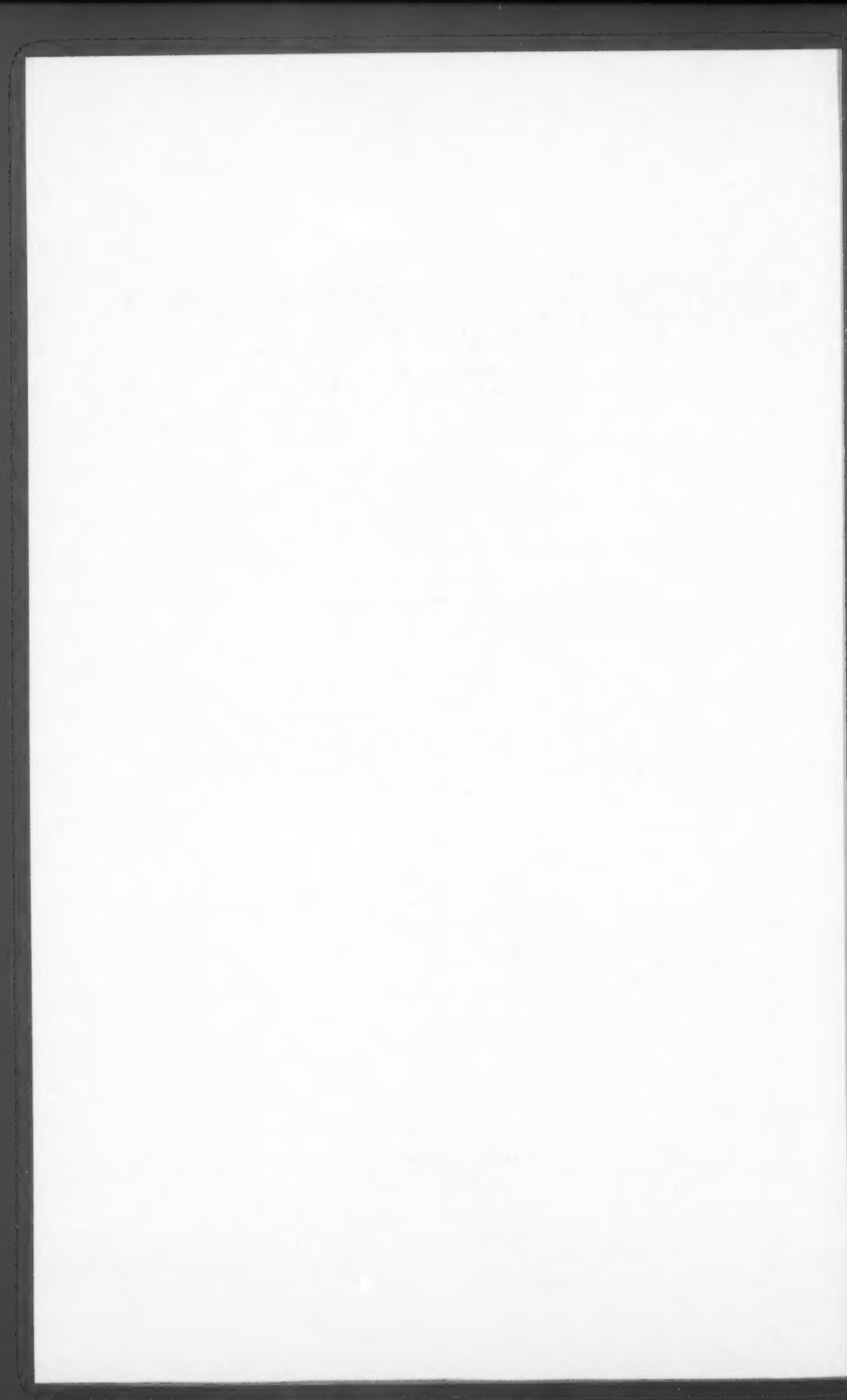
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford
James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Clerk
Joseph E. Lombardi



Decisions of the United States Court of International Trade

(Slip Op. 91-14)

INTREPID, PLAINTIFF *U.* MAMIE E. POLLOCK, DISTRICT DIRECTOR OF CUSTOMS
AND UNITED STATES, DEFENDANTS

Court No. 88-04-00279

Defendants move to strike Appendix II of plaintiff's memorandum in support of its motion for remand, and all references to and materials contained in Appendix II, alleging that inclusion of the appendix would impermissibly enlarge the scope of the administrative record.

Held: Plaintiff's Appendix II is extraneous evidence not properly part of the reviewable record and the appendix and all references to it must be stricken from the record.

[Defendants' Motion to Strike is granted.]

(Dated March 1, 1991)

Holland & Knight (David H. Baker, Dickson R. Loos and Mitchell H. Stabbe) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Velta A. Melnbrensis); of counsel: Tanya J. Potter, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Judge:* Defendants, Mamie E. Pollock, District Director of Customs, and the United States (collectively, "United States") bring this motion to strike Appendix II of Plaintiff's *Memorandum of Points and Authorities in Support of Motion for Remand Based Upon Agency Record* ("Plaintiff's Memorandum"). Defendants claim that the materials in Appendix II would impermissibly enlarge the scope of the administrative record for judicial review since they were generated after the determination which plaintiff has challenged was issued.

In this case, plaintiff, Intrepid, seeks review of the determination by the Department of Commerce ("Commerce"), that the British Standard 1387 pipe manufactured by Intrepid is within the scope of the antidumping duty order issued by Commerce as to certain steel pipes and tubes from Thailand. *Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes From Thailand*, 51 Fed. Reg. 8,341 (1986). The merits of plaintiff's action are still pending.

The antidumping duty order was issued by Commerce on March 11, 1986. *Id.* On February 24, 1988, Intrepid's counsel requested that Commerce determine if the BS-1387 pipe was within the scope of the order.

Commerce then notified interested parties of Intrepid's request and solicited comments from them. Administrative Record ("AR") (Public) Doc. 2. The petitioner and a foreign manufacturer responded and asserted that Intrepid's pipe should be included within the scope. AR (Pub.) Docs. 3 and 7. On January 19, 1989, Commerce confirmed to plaintiff's counsel that Intrepid's BS-1387 pipe was indeed within the scope of the order. PR (Pub.) Doc. 9.

On April 12, 1988, plaintiff filed a Summons and Complaint seeking a preliminary injunction to prevent Commerce from including BS-1387 pipe in the scope. After Commerce issued its January 19, 1989 determination, plaintiff amended its Complaint to include a challenge of the scope determination. Pursuant to *Intrepid v. Pollock*, 907 F.2d 1125 (Fed. Cir. 1990), the amended Complaint was accepted by this Court on October 1, 1990.

A determination by Commerce "as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping * * * duty order" may be contested in this court pursuant to 19 U.S.C. § 1516a(2)(A) (1988). See also 19 U.S.C. § 1516a(2)(B)(vi) (1988). In order for the court to find such a determination unlawful, the determination must be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (emphasis added). The record for review includes all information submitted to or obtained by Commerce "during the course of the administrative proceeding," as well as a copy of the determination and transcripts of all conferences or hearings. 19 U.S.C. § 1516a(b)(2)(A) (1988).

The caselaw of this court has been very clear that the administrative record is limited to "the particular review proceeding which results in the determination which is the subject of challenge." *Beker Indus. Corp. v. United States*, 7 CIT 313, 315 (1984); *Ipsco, Inc. v. United States*, 13 CIT ___, ___, 715 F. Supp. 1104, 1109 (1989). Any information received by Commerce after the particular determination at issue is not part of the reviewable administrative record. *Ipsco*, 13 CIT at ___, 715 F. Supp. at 1109.

Since plaintiff made its scope clarification request on February 24, 1988, and Commerce issued its scope determination on January 19, 1989, the period between these two dates is the relevant period of review. Any submissions which plaintiff or defendants wanted on the record had to be made within that time.

Plaintiff's Appendix II contains the "Verified Statement" of a metallurgist dated November 14, 1989, over nine months after the scope determination was issued. Appendix II also includes a letter from Commerce to plaintiff's counsel dated February 28, 1990, more than a year after the determination. Plaintiff asserts that it submitted Appendix II to the Court as "an example of the type of evidence that ITA should have considered" when it made its scope determination. *Reply to Motion to Strike* at 1.

The statute and caselaw are unequivocal that the Court's finding must be based on the evidence on the record. The record in this case includes all materials submitted to or obtained by Commerce between February 24, 1988 and January 19, 1989. Clearly, the documents in Appendix II are not a legitimate part of the record, since they were made well after the determination was issued.

If the evidence on the record is substantial and supports Commerce's conclusion, and the determination is otherwise in accordance with law, the determination must be affirmed. 19 U.S.C. § 1516a(b)(1)(B). Even if the Court disagrees with Commerce's decision, it may not overturn it if the conclusion is a reasonable one supported by the evidence *on the record*. See *United States v. Zenith Radio Corp.*, 64 CCPA 130, 143, C.A.D. 1195, 562 F.2d 1209, 1219 (1977), *aff'd*, 437 U.S. 443 (1978); *Mitsubishi Elec. Corp. v. United States*, 12 CIT ___, ___, 700 F. Supp. 538, 558 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990).

Since the Court may consider only the evidence which is already on the record, plaintiff must limit itself to challenging the determination on the basis of whether *that* evidence is substantial and whether the determination is otherwise in accordance with law. Plaintiff may not submit newly discovered evidence generated after the determination was issued. Accordingly, the Court holds that the addition of Appendix II to the record would be an impermissible expansion of the administrative record in this case. Defendants' motion to strike is, therefore, granted, and plaintiff's Appendix II and all references to it, shall be stricken from the record.

ABSTRACTED CLASS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASS
C91/52 2/28/91 Re, C.J.	Huffy Corp.	83-12-01794	772.48 5% 772.5 15%
C91/53 2/12/91 Aquilino, J.	Omni-Quartz Ltd.	87-9-00920	716.09- 715.0 Vario
C91/54 3/4/91 Tsoucalas, J.	St. Regis Paper Co.	83-6-00848	252.90 7.8%

CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
57	772.48 5% for outer casings and inner tubes	Huffy Corp. <i>v.</i> U.S., 730 F. Supp. 432 (1990)	Los Angeles Bicycle outer casings and inner tubes
-716.45, 05, ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. <i>v.</i> U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. <i>v.</i> U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	252.05 0.6%	St. Regis Paper Co. <i>v.</i> U.S. S.O. 87-97	Cleveland Black calendered paper

U.S. COURT OF INTERNATIONAL TRADE,
OFFICE OF THE CLERK,
New York, N.Y., March 5, 1991.

NOTICE OF AMENDMENTS TO THE RULES OF THE
UNITED STATES COURT OF INTERNATIONAL TRADE

The court, on March 1, 1991, approved certain amendments to the Rules of the United States Court of International Trade, which became effective March 1, 1991. The Rules affected by these changes are: Rules 67.1, and 89.

Copies of the amendments were transmitted to the following sources for publication:

Matthew Bender & Co.
Bureau of National Affairs, Inc.
Customs Record
The Lawyers Co-operative Publishing Co.
Oceana Publications, Inc.
Rules Service Company
United States Customs Service
West Publishing Company

If you have obtained a copy of the court's Rules from a commercial publisher, you may wish to communicate with that publisher to determine when the amendments will be available.

A copy of the amendments is available for examination in the court's Library and the Case Management Section.

JOSEPH E. LOMBARDI,
Clerk of the Court.



United States Court of International Trade



Chief Judge

Edward D. Re

Judges

[James L. Watson]
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

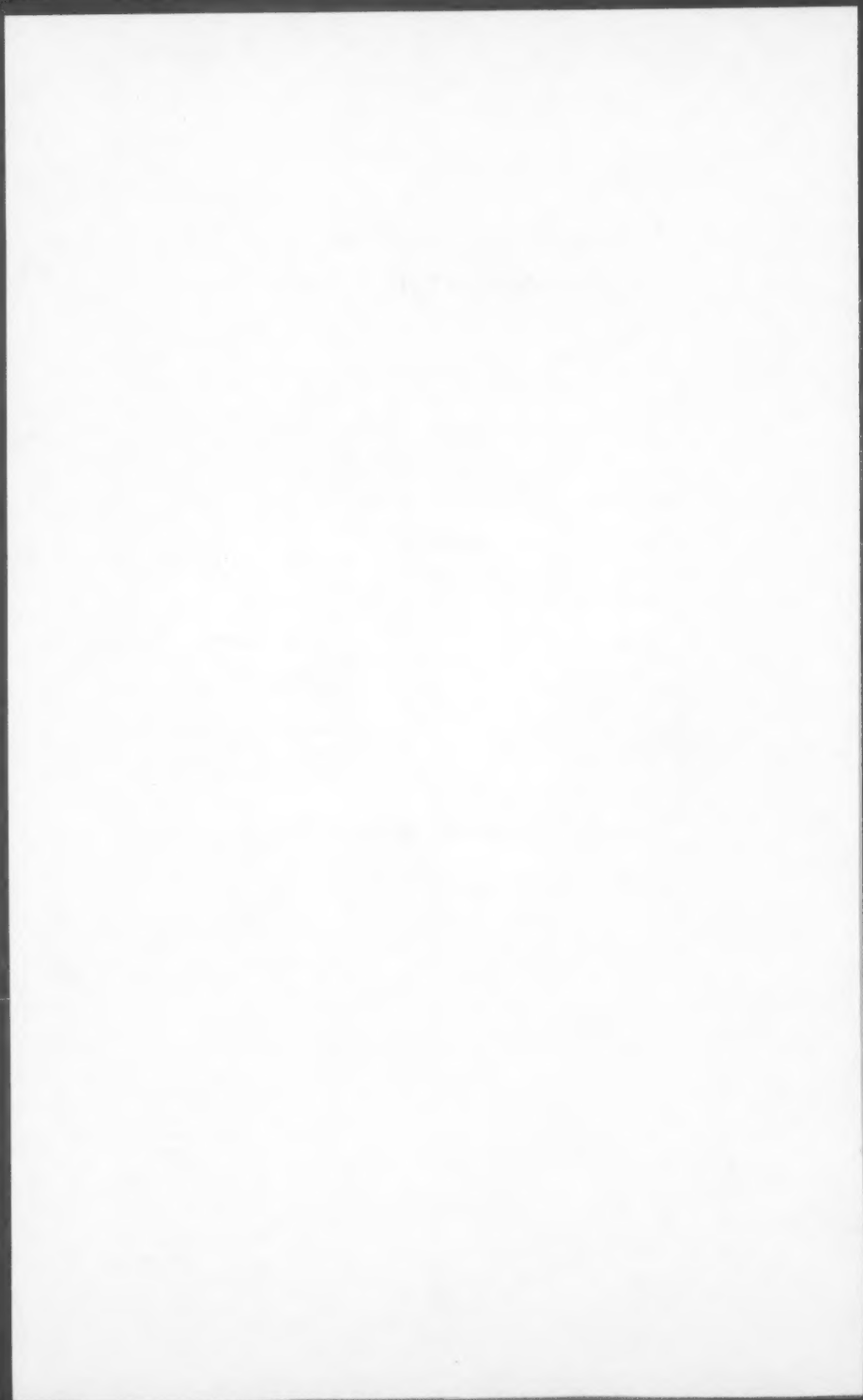
Senior Judges

Morgan Ford
James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Amendments to Rules 67.1 and 89

March 1, 1991

Effective date:
March 1, 1991



Rules of the United States Court of International Trade

EFFECTIVE NOVEMBER 1, 1980
(AS AMENDED, ~~[JANUARY 1, 1991]~~ **MARCH 1, 1991**)

Amendments to Rule 67.1

Rule 67.1 is amended as follows:

RULE 67.1. DEPOSIT IN COURT PURSUANT TO RULE 67

- (a) * * *
- (b) * * *
- (1) * * *
- (2) * * *
- (3) * * *

(4) wording which directs the clerk to deduct from the income earned on the investment a fee, consistent with that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office, ~~[equal to the first 45 days of income earned on the investment;]~~ whenever such income becomes available for deduction from the investment so held and without further order of the court.

(Added Oct. 3, 1990, eff. Jan. 1, 1991; **as amended, Mar. 1, 1991, eff. Mar. 1, 1991.**)

Amendments to Rule 89

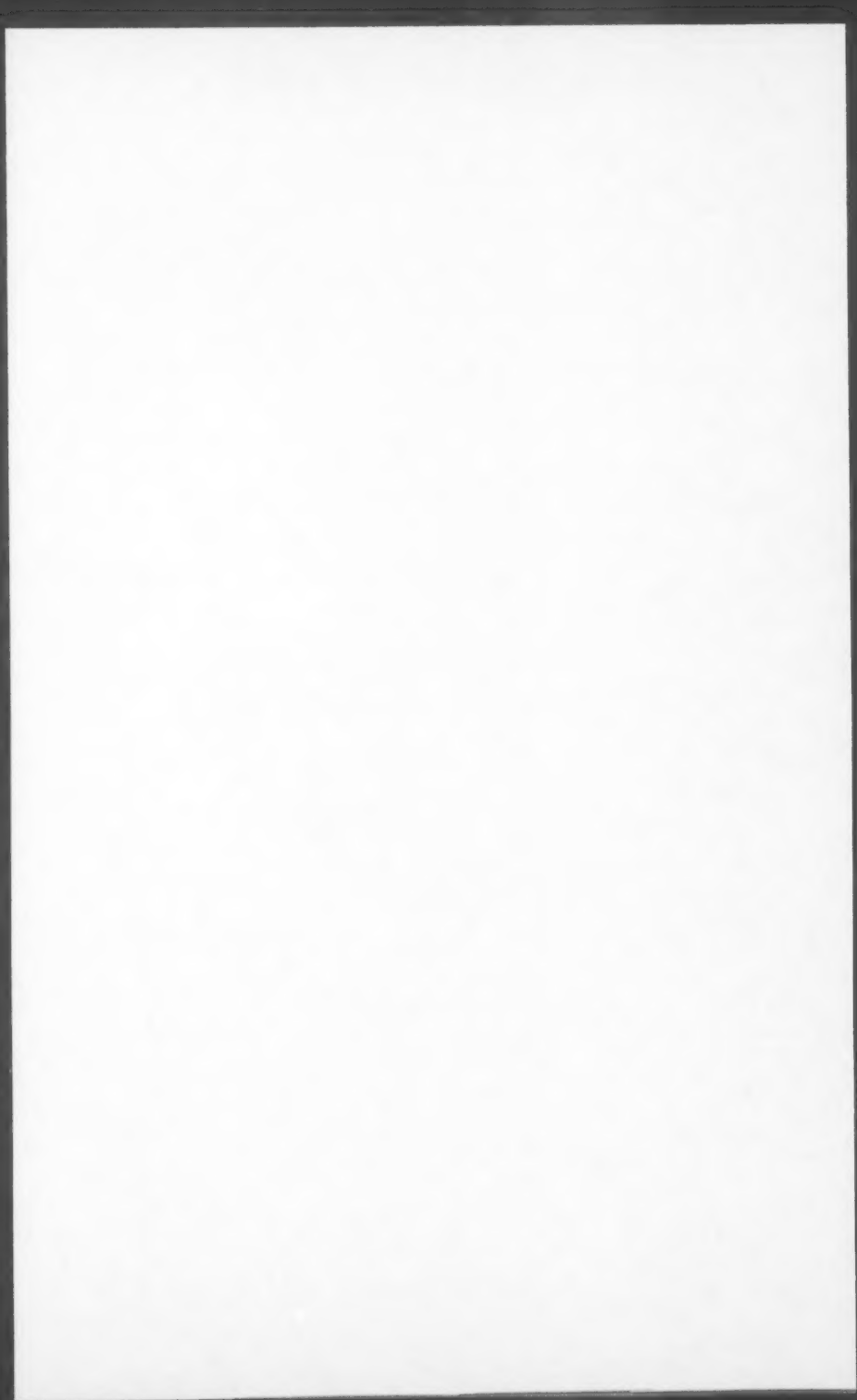
Rule 89 is amended as follows:

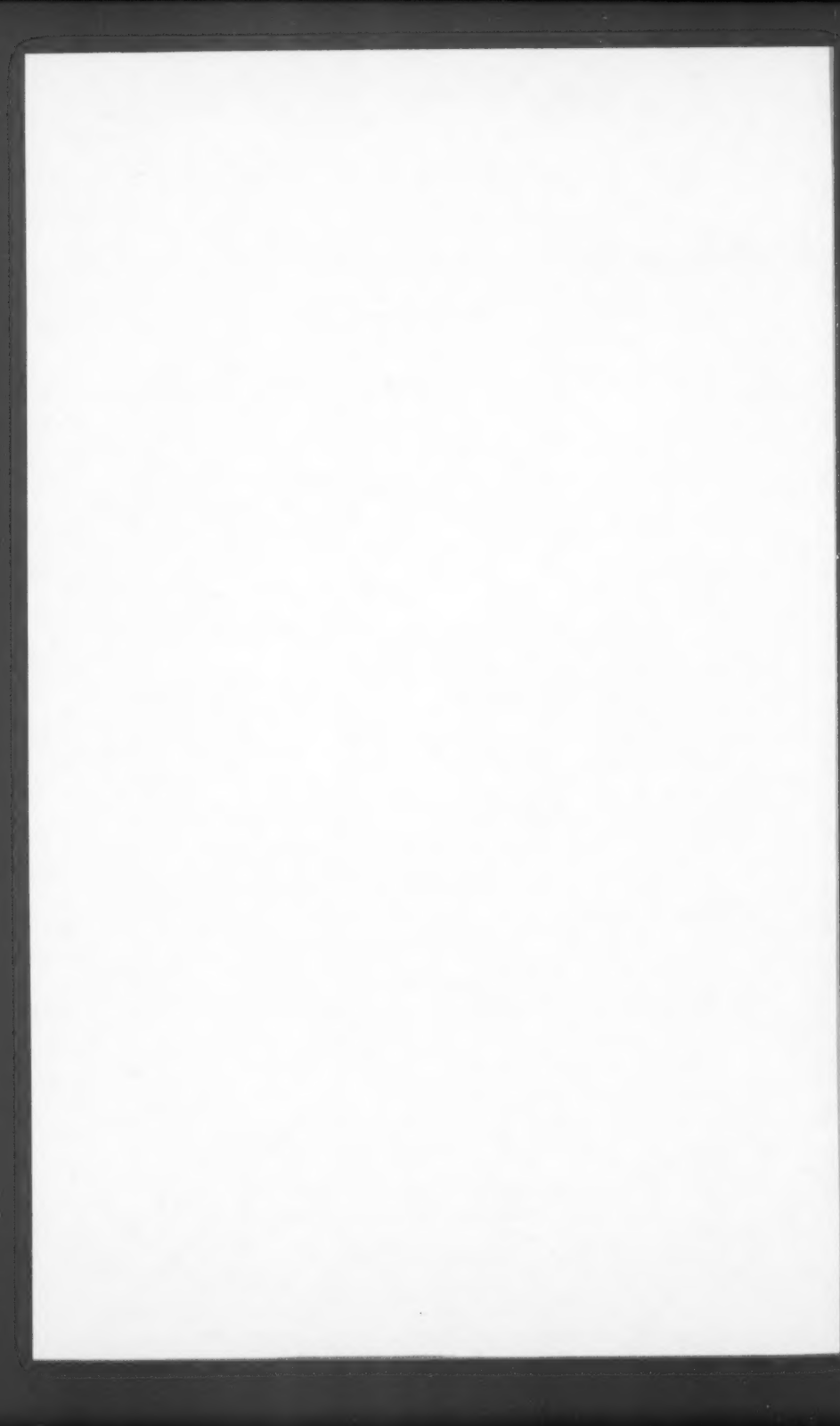
RULE 89. EFFECTIVE DATE

- (a) *Effective Date of Original Rules.* * * *
- (b) *Effective Date of Amendments.* * * *
- (c) *Effective Date of Amendment.* * * *
- (d) *Effective Date of Amendments.* * * *
- (e) *Effective Date of Amendments.* * * *
- (f) *Effective Date of Amendments.* * * *
- (g) *Effective Date of Amendments.* * * *
- (h) *Effective Date of Amendments.* * * *
- (i) *Effective Date of Amendments.* * * *
- (j) *Effective Date of Amendments.* * * *
- (k) *Effective Date of Amendments.*

The amendments adopted by the court on March 1, 1991, shall take effect on March 1, 1991. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(As added, eff. Jan. 1, 1985; as amended, June 19, 1985, eff. Oct. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Apr. 28, 1987, eff. June 1, 1987; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; **Mar. 1, 1991, eff. Mar. 1, 1991.**)





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Vol. 25, No. 13, March 27, 1991

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U.S. Court of International Trade

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